

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of the Television Table of)	MB Docket No. 04-312
Allotments to Delete Noncommercial)	RM No. 11049
Reservation on Channel *39, 620-626 MHz,)	
Phoenix, Arizona, and to Add Noncommercial)	
Reservation on Channel 11, 198-204 MHz,)	
Holbrook, Arizona)	
To: Media Bureau		

**JOINT COMMENTS OF NBC TELEMUNDO LICENSE CO. AND
COMMUNITY TELEVISION EDUCATORS, INC.**

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SUMMARY

NBC Telemundo License Co. (“NBC Telemundo”) and Community Television Educators, Inc. (“CTE”) have submitted a joint petition (“Joint Petition”) asking the Commission, based on the unique circumstances presented here, to amend the Television Table of Allotments by redesignating CTE’s Channel *39 in Phoenix, Arizona, as a commercial allotment, redesignating NBC Telemundo’s Channel 11 in Holbrook, Arizona, as a noncommercial allotment, and modifying the parties’ licenses accordingly to authorize CTE to operate on redesignated Channel *11 and NBC Telemundo to operate on redesignated Channel 39 (the “Proposal”). The Joint Petition and these Comments demonstrate the clear public interest benefits of granting the Joint Petition and the harms to the public interest that will result from rejection of the Joint Petition.

- Grant of the Joint Petition will create the first and only full-power Spanish language competitor to Univision’s KTVW-TV in Phoenix, the nation’s sixth largest Hispanic population center, ninth largest Hispanic Designated Market Area (“DMA”), and the *only* top-ten Hispanic DMA lacking such a competitor to Univision in its core city.
- If the FCC rejects the Joint Petition, Holbrook’s sole full-power over-the-air television service will likely go dark and Holbrook will likely become a white area.
- If the FCC rejects the Joint Petition, it will continue to deny nearly a million Spanish-speaking Phoenix residents a choice in local, full-power, over-the-air Spanish-language television service.
 - A recent telephone survey of Hispanic residents of Phoenix commissioned by NBC Telemundo confirms that a majority of Spanish-dominant viewers in Phoenix rely on free, over-the-air television service using indoor or outdoor antennas.
 - Forty-two percent of these viewers cited weak or no signal or other reception difficulties as their reason for not watching the Telemundo affiliate in Phoenix, which is a mere Class A station owned by NBC Telemundo.
 - Virtually all of the survey respondents believe that a choice of local television stations is critically important to their community.
 - Dozens of local advertisers with a strong interest in reaching the Hispanic residents of Phoenix confirm that they do not buy advertising time on Telemundo’s Class A station because it is not a full-power station and is not entitled to cable carriage.
- The largely theoretical concerns regarding past allotment practices do not bar the

Proposal.

- The Commission often does not follow many of the specific allotment policies asserted by the NPRM, especially when it is clear that the public interest will be served by doing otherwise.
 - Nearly all of the cities most comparable with Phoenix, including the nation's 5th, 7th, 8th, and 10th largest cities, have only a single noncommercial allotment.
 - Allotting a noncommercial station as a community's sole allotment is not a bar to the Proposal – nearly three hundred communities across the United States – ranging from state capitals to small, rural communities – have a reserved channel as their sole allotment.
- The Commission's own practices have shown that traditional allotment priorities have been altered as part of the digital transition process.
 - The FCC's own willingness to delete the Channel *39 allotment as part of the digital transition demonstrates that maintaining a second noncommercial allotment in Phoenix cannot be considered sacrosanct.
- Grant of the proposal will advance the Commission's statutory mandate to ensure a fair and equitable distribution of television stations by establishing the only operational noncommercial station in the entire state of Arizona assigned to communities other than Phoenix and Tucson.
- The existence of the underserved Spanish-language community in Phoenix itself demonstrates that Phoenix needs a ninth commercial allotment despite the presence of multiple, low-power Spanish-language facilities. The operators of these low power facilities clearly recognize the unmet needs of this audience, but there are simply not enough full-power stations in Phoenix to allow any interested party to mount full-power competition to Univision.

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Through the above-captioned proceeding, the Commission has an extraordinary and unique opportunity to promote local television competition and diversity, to preserve local television service in what otherwise would be a “white” area, to deliver a real choice in Spanish-language programming to many thousands of Hispanic households, and to better ensure the fair distribution of noncommercial television service in one of the nation’s largest television markets without notable disruption to established services.

NBC Telemundo License Co. (“NBC Telemundo”), licensee of Station KPHZ, Channel 11, Holbrook, Arizona, and Community Television Educators, Inc. (“CTE”), licensee of Station KDTP, Channel *39, Phoenix, Arizona (collectively, the “Parties”), by their attorneys and pursuant to Section 1.420(a) of the Commission’s Rules, submit these Comments in support of their Joint Petition to Amend the Television Table of Allotments (the “Joint Petition”). The Joint Petition asks the Commission to (i) exchange the reserved designation of Channel *39 with the non-reserved designation of Channel 11; (ii) modify the license of Station KPHZ to authorize operation on Channel 39; and (iii)

modify the license of Station KDTP to authorize operation on Channel *11 (the “Proposal”).¹ Both Phoenix and Holbrook are assigned to the Phoenix Designated Market Area (“DMA”). By a Memorandum Opinion and Order and Notice of Proposed Rule Making released on August 6, 2004, the Commission sought comments on the Proposal.² For the reasons stated herein and in the Joint Petition, NBC Telemundo and CTE believe that grant of the Proposal will serve the Commission’s allotment priorities and the public interest far more effectively than maintaining the status quo.

I. INTRODUCTION AND OVERVIEW

Phoenix is the sixth-largest city,³ the sixth-largest Hispanic population center,⁴ and the ninth-largest Hispanic Designated Market Area (“DMA”) in the United States.⁵

¹ See *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *39, 620-626 MHz, Phoenix, Arizona, and to Add Noncommercial Reservation on Channel 11, 198-204 MHz, Holbrook, Arizona*, Joint Petition to Amend the Television Table of Allotments (filed Aug. 7, 2003) (“Joint Petition”). When the Joint Petition was filed, the licensee of Station KPHZ was NBC Telemundo Phoenix, Inc. The station’s license was assigned to NBC Telemundo in a pro forma assignment application consummated on May 7, 2004, pursuant to prior Commission consent. See FCC File No. BALCT-20031106ALY.

² See *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *39, 620-626 MHz, Phoenix, Arizona, and to Add Noncommercial Reservation on Channel 11, 198-204 MHz, Holbrook, Arizona*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 19 FCC Rcd 14930 (MB 2004) (“NPRM”). The time period in which to submit comments and reply comments was extended to November 30, 2004, and December 14, 2004, by Order of the Video Division. See *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *39, 620-626 MHz, Phoenix, Arizona, and to Add Noncommercial Reservation on Channel 11, 198-204 MHz, Holbrook, Arizona*, Order, 19 FCC Rcd 19741 (MB 2004).

³ The 2000 population of Phoenix was 1,321,045. 2000 Census. (See <http://www.census.gov>) (“2000 Census”).

⁴ See <http://www.nielsenmedia.com/ethnicmeasure/hispanic-american/localmarkets.html> (last visited on Nov. 27, 2004). See also The Brookings Institution Center on Urban and Metropolitan Policy, *Phoenix in Focus: A Profile from Census 2000*, at 10 (Nov. 2003) (“Brookings Report”). Available at: <http://www.brookings.edu/es/urban/livingcities/Phoenix.htm> The Hispanic population in Phoenix – as elsewhere in the country – is growing rapidly. Between 1990 and 2000, the Hispanic share of Phoenix’s population grew from one-fifth to more than one-third. Brookings Report at 19.

⁵ The Phoenix DMA, which encompasses 11 counties, including Maricopa where Phoenix is located, is comprised of 1,596,280 television households. The top ten Hispanic DMAs, in diminishing order, are Los

Footnote continued on the next page.

More than one third (34.1 percent) of Phoenix's residents and more than 18 percent of the Phoenix DMA's television households are Hispanic.⁶ Of these Hispanic households, *nearly 50 percent* (45.4 percent) are Spanish-dominant, which means that Spanish is spoken exclusively or most of the time in these homes.⁷ In fact, Phoenix's Hispanic households, standing alone, would comprise a DMA larger than *half* of the nation's DMAs. Yet these households currently have access to only *one* free, over-the-air, full-power Spanish-language television station – Station KTVW-TV (Channel 33), owned ultimately by Univision Communications, Inc. (“Univision”). The Spanish-language choices available to these households are not substantially broadened by access to Spanish-language pay services – fewer than one-third of Phoenix's Spanish-dominant households subscribe to cable and only 11 percent subscribe to satellite-delivered video services.⁸ These startling statistics mean that Phoenix is the only one of the top ten Hispanic DMAs whose core city lacks a full-power local television competitor to

Angeles, New York, Miami, Houston, Chicago, Dallas-Ft. Worth, San Antonio, San Francisco, Phoenix, and Harlingen-Weslaco-Brownsville-McAllen, Texas. Nielsen Media Research, NHI Estimates by DMA: Hispanic Television Households and Persons Therein, January 1, 2005, <http://www.nielsenmedia.com/ethnicmeasure/hispanic-american/localmarkets.html> (last visited on Nov. 27, 2004).

⁶ *See id.*

⁷ *Id.* Contrary to what one might expect, the number of Spanish-dominant households is increasing, not decreasing. Over the past five years, the number of Spanish-dominant television households has grown nationally by 29 percent. *Id.*

⁸ Based on a Nielsen Media Research study commissioned by NBC Telemundo in connection with the preparation and filing of the Joint Petition, cable subscribership among Spanish-dominant viewers in Phoenix was 24.1 percent. (Nielsen Media Research, NHI County Coverage, Phoenix: February 2001.) In the recent professional telephone survey of 500 Hispanic viewers in Phoenix commissioned by NBC Telemundo, Spanish-dominant viewers reported cable subscribership of 30 percent and satellite subscribership of 11 percent, compared with an overall DMA cable penetration rate (including Hispanics) of 60 percent. *See Television Viewing Habits of Hispanic Adults in Phoenix, Arizona* (WestGroup Research, Nov. 19, 2004) (“Survey”) (attached hereto as Exhibit 1); *Television & Cable Factbook 2004*, Cable Vol. 2, at F-10. This low rate of overall cable penetration ranks the Phoenix DMA 148 out of 210 DMAs. *Id.* The broad similarities of these numbers underscore both the accuracy of the telephone Survey and the relative scant percentage of Spanish-dominant viewers who pay for cable television.

Univision. These statistics also mean that, for Phoenix's residents, the city is, in Commission allotment terms, a television gray area for Spanish-language services.⁹

Under Commission allotment precedent, there is only a single higher priority for allotting channels than the elimination of a gray area: the elimination of a white area (i.e., an area that does not receive any over-the-air, full power television service).¹⁰

Station KPHZ(TV), Holbrook, Arizona, was acquired in 2002 by NBC Telemundo with the hope that it could be used to deliver Telemundo programming to Hispanic residents of the Phoenix DMA. NBC Telemundo has determined, however, that the facility – a commercial station that has generated no revenues since it signed on nearly four years ago – cannot reach most of the target audience, particularly Hispanics living in Phoenix, many of whom rely on over-the-air signals. Because it is virtually certain that the station will cease operating as a commercial outlet, Holbrook will become a white area for both reception and transmission services by full-power stations.

The channel exchange proposed by NBC Telemundo and CTE will end Phoenix's Spanish-language gray area and ensure that Holbrook does not become a white area. By removing the reserved designation applied to Channel *39 in Phoenix and applying that designation to Channel 11 in Holbrook as set forth in the Joint Petition, the residents of Phoenix will gain an immediate full-power competitor to Univision and a vibrant and

⁹ A TV gray area is an area served by only one Grade B television signal. *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*; 15 FCC Rcd 20845, 20871 & n.125 (2000). The predicted Grade B contour of Spanish-language Station KFPH, Flagstaff, Arizona (owned by Univision) does not reach Phoenix. See *Television & Cable Factbook 2004*, Stations Vol. 1, at A-74.

¹⁰ A TV white area is an area not served by any Grade B television signal. *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*; 15 FCC Rcd 20845, 20871 & n.125 (2000).

financially viable source of Spanish-language news, public affairs, children's educational and entertainment programming.

The practical benefits of the Proposal to Holbrook are as critical: through the proposed exchange, Holbrook will retain its only over-the-air television service, which, having experienced four consecutive years of no revenues, is otherwise doomed to fail. Conversely, rejection of the Proposal will imperil Holbrook's only over-the-air television service and will leave Phoenix as the only top-ten U.S. Hispanic television market with a single Spanish-language full-power station.

In response to these immediate and compelling public interest benefits, the NPRM raises a series of theoretical concerns with the proposed exchange. The particular concerns asserted by the NPRM ignore much contrary evidence regarding how the Commission's television allotment priorities have been actually applied. Thus, although the NPRM asserts a litany of allotment considerations, literally hundreds of cases in which the Commission has departed from these theories in order to better serve the public interest demonstrate that the considerations cited by the NPRM are, at best, oft-ignored guidelines. In addition, the NPRM disregards recent and directly relevant changes in those priorities as a result of the digital television transition. Worse, the NPRM does not and cannot explain why selective application of certain allotment considerations that have been applied, at most, sporadically and, in any event, have been modified by the digital transition should dictate the Commission's action in this highly unusual case where the Proposal undeniably serves the public interest of hundreds of thousands of viewers in

both stations' communities.¹¹

¹¹ The Video Division also ruled in the NPRM that Section 1.420(h) of the Rules, which authorizes channel exchanges between commercial and noncommercial stations "serv[ing] substantially the same market" without subjecting either channel to competing application does not apply in this case. First, the Division concluded that the affected stations, despite being located in the same DMA, do not serve "substantially the same market" based on the distances separating the two communities and the absence of Grade B overlap of the stations' analog signals. Second, the Division noted that the channel exchange rule currently contemplates only intra-band exchanges, whereas in the Proposal, the noncommercial licensee will be exchanging a high-band UHF for a VHF channel.

The parties do not agree with the Division that Section 1.420(h) should not be applied to the Proposal. First, the Division misstated the distance between the two communities by a wide margin – the distance is 145 miles, not the 228 miles set forth in the NPRM. Second, the Commission no longer relies on signal contours to determine the size, shape or nature of television and radio markets. Instead, the Commission wisely has adopted the market definitions actually used by the broadcasters themselves. In the case of television stations, the relevant market is the Designated Market Area (*see* 47 C.F.R. § 73.3555(b) (2003)), and here, both stations are assigned to the Phoenix DMA. Television & Cable Factbook 2004, Vol. 1, at A-88.

The Division's focus on the inter-band nature of the exchange is also misplaced. Section 1.420(h) is currently limited to intra-band exchanges solely because the Commission was expediting its consideration of the issue and did not take the time to address inter-band changes in the Report and Order. When the FCC originally proposed Section 1.420(h), however, it specifically noted the advantages that could be derived from allowing a commercial **UHF** operator to exchange its channel with a noncommercial **VHF** operator. *See Television Table of Assignments to Change Noncommercial Educational Reservations*, Notice of Proposed Rule Making, 50 Fed. Red. 10817 (1985). In particular, the Commission noted with approval that it "encourages its licensees to upgrade their facilities and quality of service" and that "[a] commercial UHF licensee agreeing to change a channel with a noncommercial VHF operator could expect to significantly enhance its competitive posture. The noncommercial operator might determine that its switch to UHF operation would likely result in little, if any, audience erosion due to the unique nature of its programming and its availability only on its station. Such exchanges may be particularly advantageous for existing UHF independent stations seeking competitive comparability where affiliate stations now occupy all commercially available VHF channels. . . . In addition, the noncommercial VHF licensee could expect to receive needed financial resources and/or equipment and other assets from the commercial licensee in return for their agreement to exchange channels." *Id.* ¶ 11.

The goal of improving the competitive posture of a commercial station as the justification for an inter-band exchange quoted above is precisely parallel to the goal of the Proposal. In this case, however, the parties propose that the noncommercial operator be assigned the technologically preferred VHF channel. Therefore, to the extent the "same band" limitation was motivated originally by a desire to protect against a migration of NCE stations to the UHF band (which does not appear to be the case), that concern is not presented by this case. Although the rule as adopted contained the "same band" restriction, the Commission noted expressly that "[b]ecause of the need for expediting [the rule change], we are dealing only with intra-band exchanges. Nothing we do herein is intended to prejudice any future decision by the Commission on the inter-band . . . exchange proposal." *See Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 59 RR 2d 1455, 1456 n.1 (1986), *recon. denied*, 3 FCC Rcd 2517 (1988) ("Channel Exchange Order").

The Commission has not substantively reexamined the intra-band element since it adopted the rule more than sixteen years ago. During that period, however, it *has* mandated a transition to digital transmission technologies – a transition that is well underway and through which many stations are expected to switch from UHF to VHF and vice versa without reliance on the traditional band differences. Accordingly, the

Footnote continued on the next page.

A close examination of the past application of the allotment considerations cited as concerns in the NPRM confirms that the Commission has departed from these considerations frequently when the public interest will be served thereby. For example, the NPRM cites an asserted policy of allotting a commercial channel to a community before allotting a noncommercial channel to that same community. The implication is that Holbrook's sole allotment should not be a reserved channel. Yet a review of the current analog Table of Allotments reveals that nearly 300 communities were assigned a reserved channel as their sole allotment, including state capitals such as Dover, Delaware, and Annapolis, Maryland.

Similarly, a number of cities that are comparable in size to or even larger than Phoenix have only a single noncommercial allotment. Indeed, because the Commission was prepared to eliminate the reserved Phoenix allotment entirely as part of the digital transition, it is impossible to conclude now that the reserved status of that channel is somehow sacrosanct and the proposed exchange is so contrary to the Commission's allotment considerations as to justify denying the residents of Phoenix and Holbrook the immediate real-world benefits offered by the Proposal. Thus, the Commission's theoretical concerns about its unsupported litany of allotment considerations neither are routinely consistent with the Commission's past practices nor any basis on which to deny the Proposal.

"same band" limitation should not be a bar to a channel exchange in an appropriate case, particularly where, as here, the Commission has the authority to waive that limitation.

Although, for the foregoing reasons, the parties do not agree with the Division's conclusion that Section 1.420(h) is inapplicable, they agree with the Division that, in the alternative, the proposal can be effectuated through a rulemaking proceeding coupled with license modifications under Section 316 of the Communications Act of 1934, as amended. Accordingly, these Comments are addressed to that procedure.

II. THE PROPOSAL IS UNIQUE BOTH IN ITS UNDERLYING FACTUAL CIRCUMSTANCES AND IN THE BENEFITS IT WILL DELIVER TO THE PUBLIC

A. The Nature of the Two Communities Involved in this Intra-Market Exchange is Unique

1. Holbrook, Arizona

Holbrook is located in northeastern Arizona between the Mogollon Rim country to the south, the Navajo and Hopi Indian Reservations to the north, the Grand Canyon to the west, and the Petrified Forest to the east.¹² The 2000 Census measured the town's population as 4,917.¹³ Station KPHZ is the only operating full-power television station licensed to Holbrook. A second allotment for a noncommercial station on Channel *18 has been vacant for more than 30 years and will be deleted from the Table of Allotments pursuant to the *Sixth Report and Order* in the Commission's digital television transition docket.¹⁴ Holbrook does not receive over-the-air television service from any other full-power television station,¹⁵ and the town's residents receive their television service via cable and satellite. Accordingly, this community of 4,917 residents is a gray area for allotment purposes.

NBC acquired KPHZ on September 26, 2002, in the hope that the station could be upgraded or otherwise modified to bring a real full-power Spanish-language

¹² See Economics, City of Holbrook, Arizona Website, http://www.ci.holbrook.az.us/index.asp?Type=B_BASIC&SEC={380B7ABB-EF4A-479D-B928-2C3D604C1B63} (last visited on Nov. 23, 2004) ("Holbrook Website").

¹³ See Holbrook Website; 2000 Census.

¹⁴ See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, 14639 (1997) ("*Sixth Report and Order*").

¹⁵ See Statement of Hammett & Edison, Inc., Consulting Engineers, *NBC Telemundo License Co. Proposed Exchange of Allotments: Phoenix and Holbrook, Arizona*, at 5 (Nov. 28, 2004) ("Engineering Statement") (attached hereto as Exhibit 2).

programming choice as a Telemundo affiliate to the Hispanic residents of Phoenix and the Phoenix DMA.¹⁶ After extensive research (including evaluations by outside consulting engineers), however, Telemundo reached the conclusion that the station simply is not viable for the purpose of serving Phoenix's Hispanic population, because it cannot deliver an over-the-air signal to the Phoenix metropolitan area. A strong, reliable over-the-air signal is particularly important for reaching Hispanic viewers, because these viewers have much lower cable penetration rates (less than one-third of Phoenix Spanish-language television households compared with the Phoenix overall average of 60%)¹⁷ and rely much more heavily on indoor antennas than the non-Hispanic population. Further, KPHZ has been unable to generate revenues since it signed on nearly four years ago (even with its initial home shopping format and very streamlined operations) and cannot attract advertisers.¹⁸ Indeed, KPHZ meets all of the criteria for a failing station under the Commission's local ownership rules because it has no all-day audience share and has had negative cash flow for the three consecutive years.¹⁹ In the absence of the channel exchange proposed herein, it is virtually certain that KPHZ will fail as a commercial outlet and will go dark, thereby creating a white area (for purposes of both reception and transmission tests) in Holbrook and causing a net loss of television service available in the Phoenix DMA.

¹⁶ See BALCT-20020426AAP.

¹⁷ See note 8 *supra*.

¹⁸ The existence of KPHZ is not even noted on the official Holbrook website, which lists, under the heading "Communication," two radio stations and the following television services: "53 television channels from Phoenix, Flagstaff, Chicago and Atlanta, including HBO, Pay Per View, Disney and the Movie Channels." See Holbrook Website (Economics Section).

¹⁹ See 47 C.F.R. § 73.3555, Note 7(2) (2003).

2. Phoenix, Arizona

Phoenix is the sixth-largest Hispanic population center and the ninth-largest Hispanic DMA in the nation – its 294,560 Hispanic television households, standing alone, would constitute a DMA larger than *half* of the DMAs in the country. The Phoenix region is also one of the fastest-growing areas of the United States, due in part to increased immigration.²⁰ Because nearly 60 percent of the city’s foreign-born residents arrived in Phoenix within the last ten years, Phoenix faces unique challenges in connecting these residents to the educational, political, and educational mainstream.²¹ Access to broadcast media in their native languages can play a major role in helping these recent arrivals to become integrated into the social and economic life of their community.

The Hispanic population of Phoenix is growing even more rapidly than the overall population, in part through a steady flow of Spanish-speaking immigrants from Mexico and Central and South America. This demographic pattern means that a large percentage of Phoenix’s Hispanic households are Spanish-language dominant. Yet, despite this very sizeable and rapidly growing population of Hispanic and Spanish-dominant viewers, Phoenix is the *only* major city in the top ten Hispanic DMAs that lacks a full-power competitor to Univision. All of the remaining top ten Hispanic DMAs benefit from competing full-power Spanish-language television stations within their central urban core. As a result of its unique position in Phoenix, Univision currently claims 84 percent

²⁰ Of the 23 major cities included in the Brookings Institution’s “Living Cities” project, Phoenix experienced the fastest growth throughout the 1980s and 1990s. Brookings Report at 11. One in five of Phoenix’s residents is foreign-born, and 79 percent of these foreign-born residents are Hispanic, primarily emigrating from Mexico (74 percent). Nearly six in ten of Phoenix’s foreign-born residents entered the U.S. in the 1990s, with by far the largest percentage of those immigrants coming from Mexico. *Id.* at 4.

²¹ *Id.*

of the Spanish-language television advertising revenues²² and 93 percent of the Hispanic viewers in the market.²³

The city of Phoenix currently has two noncommercial allotments: Channel *8 (Station KAET, PBS), licensed to the Arizona Board of Regents (Arizona State University), and Channel *39, occupied by KDTP. A third station licensed to Phoenix, Station KPAZ-TV (Channel 21), operates noncommercially on a commercial frequency and is owned by Trinity Broadcasting, the largest religious broadcaster in the country. Beyond the city limits, the Phoenix DMA has ten additional noncommercial channels allotted to it, but none of these allotments is occupied by an operational station. The noncommercial allotments are either vacant and, with the exception of the Kingman reserved allotment, destined to be eliminated under the *Sixth Report and Order* or are the subject of applications that have been pending for more than eight years and may never result in the introduction of new television service in the DMA. The only other stations operating on reserved allotments in Arizona outside of Phoenix are both licensed to Tucson.²⁴ This means that for the entire state of Arizona – a geographic area

²² The television revenues not claimed by Univision are attributable to Telemundo's Class A station in Phoenix, not to KPHZ.

²³ Univision owns a second full-power television station in the Phoenix DMA (KFPH-TV, Flagstaff). In addition, Univision, as a result of the Commission's approval of its acquisition of Hispanic Broadcasting Corp., also owns five radio stations in the Phoenix market (KHOT-FM, Paradise Valley; KHOV-FM, Wickenburg; KKMR-FM, Arizona City; KMRR-FM, Globe; and KOMR-FM, Sun City).

²⁴ Arizona is comprised of two DMAs – the Tucson DMA (Pima, Cochise, and Santa Cruz Counties), which occupies approximately the lower 20-25 percent of the state, and the Phoenix DMA, which occupies most of the remainder of the state. In addition, two stations licensed to Yuma, Arizona (Yuma County), are included in the Yuma, Arizona-El Centro, California DMA, and the northern half of Apache County in the northeastern corner of Arizona along the New Mexico border (with no allotted or operational television stations) is assigned to the Albuquerque-Sante Fe, New Mexico, DMA. The southern half of Apache County is assigned to the Phoenix DMA. See *Broadcasting & Cable Yearbook 2003-2004* at B-137, B-195, B-211, B-218 (2003).

encompassing more than 114,000 square miles – all of the stations operating on reserved channels are licensed to just two communities.

B. The History of the Allotments at Issue in This Proceeding is Unique

The two stations at issue in this proceeding are very recent additions to the Phoenix DMA, having signed on less than four years ago. Indeed, the stations are so new that neither was assigned a paired digital channel. In fact, the FCC had already made a policy determination to delete the Channel *39 allotment – which had lain fallow for over 30 years – to facilitate the digital transition and would have done so if an application had not been filed just weeks before the deadline.²⁵

The Holbrook Channel 11 allotment lay fallow for ten years and also would have been deleted if applications for the channel had not been filed in 1996, just prior to the Commission’s decision to delete all vacant allotments to pave the way for the digital transition. Since its sign-on in 2001, however, the station has generated no revenues, even when running a home shopping format, and has never shown viability as a commercial station.

Thus, this is not a case in which a long-established noncommercial station seeks to convert to commercial status, thereby resulting in a net reduction in the number of reserved channels in the market.²⁶ To the contrary, the Phoenix DMA will have the same

²⁵ See *Sixth Report and Order*, 12 FCC Rcd at 14639.

²⁶ Because the Proposal will not result in a net reduction in reserved channels assigned to the DMA, this case is clearly distinguishable from the Commission’s decision in *Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel *16, 482-488 MHz, Pittsburgh, Pennsylvania*, 17 FCC Rcd 14038 (2002) (“*WQED*”). In this respect, the instant proposal is more closely aligned to the exchange of commercial and reserved noncommercial designations for two stations owned and operated in Buffalo, New York, by Western New York Public Broadcasting Association and approved by the FCC in *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations and Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Buffalo, New York)*, 14 FCC

Footnote continued on the next page.

number of reserved channels both before and after the proposed exchange. Further, if the Proposal is approved and implemented as envisioned by the parties, NBC Telemundo will assign its Class A station licensed to Phoenix (KDRX-CA) to CTE, which will operate the station noncommercially, thereby resulting in a net *increase* in the number of full power and Class A noncommercial stations operating in the Phoenix DMA. Under these unique circumstances, concerns about the theoretical underpinnings of the FCC's overall allotment plan are arbitrary and misplaced because, under that plan, the Channel *39 allotment would not even exist but for a last-minute application, and the Channel 11 allotment also faced deletion.

C. Phoenix's Hispanic Viewers Want Choice In Spanish-Language Programming But Have Difficulty Receiving Telemundo's Class A Station Over-The-Air

In contrast to the NPRM's focus on theoretical allotment concerns, NBC Telemundo's concerns focus on the reality that the nearly one million Hispanic residents of Phoenix have no choice in Spanish-language programming. Many of these residents are Spanish-dominant viewers who rely first and foremost on television for access to news and who rely disproportionately on indoor antennas to receive over-the-air signals. A professional survey commissioned by NBC Telemundo in October/November 2004 substantiates these concerns.²⁷ The Survey found that:

- Spanish-dominant viewers in Phoenix are much more likely to receive local programming via over-the-air sources, and *a disproportionately large percentage of these viewers (41 percent) rely exclusively on indoor antennas to receive Spanish-language programming.*

Rcd 11856 (MMB 1999) ("*Buffalo*"), *on recon.*, 16 FCC Rcd 4013 (2000), *aff'd Coalition for Noncommercial Media v. FCC*, 249 F.3d 1005 (D.C. Cir. 2001).

²⁷ See Survey, at Exhibit 1.

- Fifty-five percent of the respondents (both bilingual and Spanish-dominant) who rely on over-the-air reception reported that they *cannot* watch Telemundo's Class A station *because the signal is too weak*, and 76 percent said they would watch Telemundo more often if the signal were stronger.
- *Ninety-six percent of the respondents* who rely on over-the-air reception agreed that it is important to have more than one local Spanish-language television station to provide more diversity and choice.

The results of the Survey bear out what common sense tells us: Phoenix's large and growing Hispanic population is an underserved audience, and the city needs a ninth commercial allotment to introduce real competition to the market's only full-power Spanish-language station.

III. THE PROPOSAL WILL FURTHER THE FCC'S ALLOTMENT CONSIDERATIONS AND THEREBY SERVE THE PUBLIC INTEREST FAR MORE EFFECTIVELY AND CONCRETELY THAN MAINTAINING THE STATUS QUO

All of the Commission's allotment decisions must be guided by the Communications Act's mandate that the FCC "shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution" of broadcast facilities throughout the country.²⁸ In response to this mandate, the Commission, over the years, has developed priorities that guide its allotment and licensing decisions.²⁹ The four principal

²⁸ 47 U.S.C. § 307(b).

²⁹ The television allotment priorities are as follows: (1) to provide at least one television service to all parts of the United States; (2) to provide each community with at least one television broadcast station; (3) to provide a choice of at least two television services to all parts of the United States; (4) to provide each community with at least two television stations; and, (5) to assign any remaining channels to communities based on population, geographic location, and the number of reception television services available to the community. *Amendment of Section 3.606 of the Commission's Rules and Regulations*, Sixth Report and Order, 41 F.C.C. 148, 167 (1952) ("*Sixth Report & Order on TV Allocations*"). In addition to relying on these priorities to make its original television allotment decisions, the Commission refers to these priorities evaluating petitions for rulemakings to change the existing television allotments. *See, e.g., Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations, and Section 73.622(b), Table of*

Footnote continued on the next page.

allotment priorities – which direct the Commission to favor a proposal that enables an operational service in what otherwise would be a white area – underscore that the Proposal, by making it far more likely that a television station can survive in Holbrook, should be adopted.

However, even these priorities – and certainly other Commission allotment considerations – do not operate in a factual vacuum; nor do they form a fossilized body of law. Rather, the Commission must consider each community’s unique circumstances and needs in making allotment decisions and must adapt its overall allotment policies to the changing needs and circumstances of the public it serves.³⁰

The Commission demonstrated the adaptability of its allotment policies when it embarked on the conversion of television broadcasting from analog to digital. As part of that transition, the Commission decided that it would eliminate all existing vacant NTSC allotments to facilitate development of the DTV Table of Allotments.³¹ The Commission’s policy decisions and its actions implementing those decisions confirm that the proposed allotment exchange is not contrary to the public interest or Commission

Allotments Digital Television Broadcast Stations (Columbia and Edenton, North Carolina), Notice of Proposed Rulemaking, 19 FCC Rcd 14618, 14618-19 n.3 (MB 2004) (“*North Carolina*”).

³⁰ Indeed, when the Commission first established the table of allotments in 1952, it stated: “At the outset it should be clearly understood that no single mechanical formula was utilized in the construction of the Table of Assignments. With the [allotment] priorities in mind it was necessary to recognize that geographic, economic and population conditions vary from area to area and even within the boundary of a single state; the possibility of assigning channels, for example, may differ as between the northern and southern segments or between the eastern and western parts of the same state. It must be emphasized, therefore, that in establishing the Table of Assignments it is not possible to follow a mechanical and rigid application of the basic principles or what was termed the ‘priorities’ in the Third Notice.” *Sixth Report & Order on TV Allocations*, 41 F.C.C. ¶ 65.

³¹ *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Further Notice of Proposed Rule Making, 11 FCC Rcd 10968, 10992 (1996) (“*Sixth Further Notice of Proposed Rulemaking*”); *Sixth Report and Order*, 12 FCC Rcd at 14635-40.

policy. Rather, the Proposal is consistent with Commission policy and will serve the public interest far more effectively than will maintaining the status quo.

A. The Commission Had Already Decided As A Policy Matter To Delete The Channel *39 Allotment To Pave The Way For The Digital Transition And Would Have Done So Absent A Last-Minute Application

The NPRM, citing the allotment policy established in the 1960s of endeavoring to allot two noncommercial channels to the “very largest cities,” asks as a threshold matter whether the dereservation of one of two noncommercial channels allotted to the city of Phoenix is consistent with that policy.³² Yet in conjunction with the digital transition, and as the NPRM confirms,³³ the Commission *already* had made a policy decision to delete *all* vacant NTSC allotments,³⁴ including the very reserved Channel *39 at issue in this proceeding, and would have done so if an application had not been filed for this allotment just weeks before the deadline established in the *Sixth Further Notice of Proposed Rule Making*.³⁵ In the Phoenix DMA alone, six noncommercial allotments,

³² NPRM, 19 FCC Rcd at 14933. It should be emphasized that the parties’ proposal would not result in a net reduction of reserved noncommercial allotments in the Phoenix Designated Market Area, which would still have a total of *at least* three such allotments, including current reserved allotments in Phoenix (KAET, Channel *8, licensed to the Arizona Board of Regents (Arizona State University); Channel *17, Page, for which an application has been pending since 1996; the vacant reserved allotment of Channel *14 at Kingman, which has been assigned a paired digital channel (*see* 47 C.F.R. § 73.622 (2003); and the proposed reservation of Channel 11, Holbrook). In addition, Trinity Broadcasting of Arizona, Inc. operates Channel 21 noncommercially. Other reserved allotments in the Phoenix DMA -- Channel *14 at Globe, Channel *17 at Parker, Channel *18 at Holbrook, Channel *19 at Prescott, Channel *22 at McNary and Channel *23 at Safford -- will be deleted as vacant NTSC allotments pursuant to the Commission’s *Sixth Report and Order* in the DTV proceeding. *See Sixth Report and Order*, 12 FCC Rcd at 14639; *Sixth Further Notice of Proposed Rulemaking*, 11 FCC Rcd at 11013. Two other reserved allotments in the Phoenix DMA (Channel *43, Coolidge, and Channel *16, Flagstaff) likely will also be deleted. In 1996, each allotment attracted three applications, all of which the Commission has dismissed. *See infra*.

³³ NPRM, 19 FCC Rcd at 14931 (“The reserved channel [in Holbrook] was never applied for, and was deleted by the Commission in 1996 with all other unapplied for NTSC channels in the TV Table of Allotments”).

³⁴ *Sixth Report and Order*, 12 FCC Rcd at 14639.

currently vacant, are to be eliminated for such administrative reasons. In the state of Arizona, a total of nine noncommercial allotments will be eliminated to pave the way for the digital transition.³⁶

The Commission reached the policy decision to delete these vacant reserved allotments even in the face of a specific plea to preserve noncommercial allotments.³⁷ The Commission did not undertake a channel-by-channel analysis to determine if deletion of those channels would violate fundamental allotment priorities under which such channels originally were allotted before ordering the deletion of vacant NCE channels. Instead, the Commission stated that it would consider, at some nebulous future time, “establishing additional noncommercial reserved allotments on recovered spectrum for those existing vacant noncommercial allotments that cannot be replaced at this time.”³⁸

Such sweeping elimination of many communities’ sole transmission service and many noncommercial allotments demonstrates that “long-standing” allotment considerations cited in the NPRM cannot be used to dismiss out-of-hand the mere exchange of two allotments. Indeed, because the Commission had already concluded that even the total elimination of the reserved allotment for Channel *39 was consistent with

³⁵ *Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd at 11013.

³⁶ Compare 47 C.F.R. § 73.606 with 47 C.F.R. 73.622 and *Sixth Report and Order*, 12 FCC Rcd at 14781-14823.

³⁷ *Sixth Report and Order*, 12 FCC Rcd at 14639. Although the Commission modified its stated intention to delete *all* vacant NTSC allotments by noting in the *Sixth Report and Order* that the new DTV Table of Allotments preserved noncommercial allotments and paired them with a digital channel “where feasible,” the only vacant noncommercial allotment in Arizona that received this treatment is Channel *14 (NTSC), Kingman, Arizona, which was assigned DTV Channel *46. Accordingly, the remaining vacant reserved NTSC allotments were not assigned paired digital channels and will be deleted, as confirmed in the NPRM.

³⁸ *Id.*

its allotment priorities and the public interest, it cannot now claim that the Channel *39 assignment to Phoenix is somehow sacrosanct. But for the filing of last-minute applications,³⁹ the Commission would have eliminated the allotment, and the city of Phoenix would have had only one reserved channel allotted to it. The Proposal results in no net loss of reserved channels in the DMA and preserves an existing broadcast outlet that otherwise appears doomed to fail. In light of this unusually recent and directly pertinent history, any concern that the mere exchange of these allotments threatens what the NPRM asserts are long-standing allotment considerations may be safely dismissed.

B. The NPRM's Suggestion That The Largest U.S. Cities Must Have Two Reserved Channels Allotted to Them Is Not Supported By The Facts

Beyond this response to the NPRM's asserted theoretical allotment concerns, the specific facts of this highly unusual case confirm that the Proposal will not endanger the Commission's traditional allotment priorities as those priorities are implemented in the real world. The NPRM notes that Phoenix is now the sixth largest city in the United States⁴⁰ and asks whether dereservation of one of the two reserved channels allotted to Phoenix is consistent with the public interest.⁴¹ Contrary to the NPRM's implication that two reserved allotments is the norm for most large cities, a review of the Table of Allotments and data from the 2000 Census demonstrates that, even with respect to the ten largest cities in the United States, the Commission has disregarded this allotment consideration as frequently as it has adhered to it. Fully half of the 10 largest cities in the

³⁹ Indeed, CTE's application was filed *after* the deadline as a mutually exclusive alternative to the lead application.

⁴⁰ This ranking is based on 2000 Census data. *See* NPRM, 19 FCC Rcd at 14932 & n.9.

⁴¹ *Id.* at 14933.

nation have a single noncommercial allotment, and four of these five have a UHF station as their sole noncommercial allotment: New York City, No. 1 (Channel *25); Philadelphia, No. 5 (Channel *35); San Diego, No. 7 (Channel *15); Dallas, No. 8 (Channel *13); and Detroit, No. 10 (Channel *56).⁴²

If the Proposal were adopted, the residents of Phoenix would continue to have access to noncommercial service that is equal to or better than each of these five top-ten cities. Its noncommercial allotment is a high-VHF facility (Channel *8), while four of the other top-ten cities rely on weaker UHF channels. In addition, one of Phoenix's commercial allotments supports a noncommercial facility. Thus, it is Phoenix's current reservation of *two* noncommercial allotments that appears out of step with the distribution of reserved channels in other comparably sized cities. At the very least, these facts demonstrate that the Proposal is not inconsistent with the Commission's past practices.

One other noncommercial allotment in the Phoenix DMA – Channel *43, Coolidge, Arizona – may bring additional noncommercial service to the Phoenix metropolitan area. Although all three applications for the vacant reserved allotment in Coolidge, Arizona, filed in 1996, were dismissed by the Commission on August 2, 2004, one of those applicants, the American Legacy Foundation, has sought reconsideration of that dismissal. If successful, that applicant can be expected to construct its station and

⁴² See 47 C.F.R. § 73.606 (2003). Of course, there are additional noncommercial allotments and operating stations in the DMAs in which these cities are located. However, as the Proposal will not alter the number of noncommercial allotments within the Phoenix DMA, the NPRM posed the question with respect to only the central city (i.e., Phoenix) in the DMA ranked by 2000 Census population figures. Accordingly, the comparison of the top 10 cities in the U.S. described in the text demonstrates that the NPRM's theoretical concern is illusory.

offer new noncommercial service to Phoenix.⁴³ (Another nearby noncommercial allotment – in Globe, Arizona – could have offered similar additional service, but is to be eliminated by the Commission pursuant to the *Sixth Report and Order*.) Further, if the Proposal is completed as envisioned by the parties, as noted above, CTE is willing to commit to noncommercial operation of Class A Station KDRX-CA, which the Commission concludes has similar contours as KDTP (albeit with much reduced signal strength for households, like nearly half of Telemundo’s targeted demographic, that rely on indoor antennas to receive a signal).⁴⁴ Such operation will preserve the number of full power and Class A stations operating noncommercially within the city of Phoenix and will help to ensure that the viewers of CTE’s Daystar network have continued access to this programming.

C. Implementation Of The Proposal Will Result In A More Equitable Distribution Of Noncommercial Stations In The Phoenix DMA And The State Of Arizona

Implementation of the Proposal also will diversify the distribution of stations

⁴³ See FCC File No. BPET-19960710LC. Two other reserved allotments may bring additional noncommercial service to the Phoenix DMA, but both of these allotments are located even farther from the Phoenix urban area than Holbrook. As noted above, an application for the vacant reserved allotment on Channel *17, Page, Arizona, was accepted for filing in 1996 and remains pending, although the applicant apparently did not respond to a Commission request for further information about the application. See note 46 *infra*. Page is located in the extreme northern part of Arizona, on the Arizona-Utah border. Also as noted above, the Commission has not deleted the vacant allotment for Kingman, Arizona, in the northwestern part of the state near the California and Nevada borders. Finally, three applications were filed for Channel *16 in Flagstaff, Arizona, which is also part of the Phoenix DMA, but two of the applications were dismissed while the third was returned by the Commission.

⁴⁴ The Commission’s Rules permit a noncommercial broadcaster to apply for a commercial frequency to be operated noncommercially, including low power and TV translator stations. Although the Commission has not set aside any reserved frequencies for the low power or TV translator service, the Commission *has* allowed NCE entities to operate noncommercially on channels generally available in these services, and applications for such channels are submitted and processed on a “demand basis.” See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6692 & n.4 (2003); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 3833, 3833-34 (2002).

operating on reserved channels within the Phoenix DMA, which would further the Commission's mandate to ensure a fair and equitable distribution of broadcast stations among and within the States. Currently, Phoenix is the only community within its entire DMA that has an operational noncommercial station, and only two cities in the entire state of Arizona – Phoenix and Tucson – have operational noncommercial television stations. Following the expected deletion of the reserved allotments for Holbrook, Globe, Parker, Prescott, McNary, and Safford and the possible deletion of the Flagstaff and Coolidge reserved allotments,⁴⁵ the only reserved allotments in the entire Phoenix DMA will be in Phoenix, Kingman (which, as noted above, is in the northwestern part of Arizona), and Page – which itself appears to be headed for deletion.⁴⁶ This means that for a huge geographical area in Arizona north of Phoenix and within the Phoenix DMA of approximately 58,000 square miles⁴⁷ (an area larger than the entire state of Illinois),⁴⁸

⁴⁵ As noted above, reserved allotments exist in the Phoenix DMA for Flagstaff and Coolidge, Arizona, but all pending applications for the Flagstaff and Coolidge facilities either have been returned or dismissed. One of the Coolidge applicants has sought reinstatement of its application. In addition, the vacant reserved allotment in Kingman on Channel *14 has been assigned a paired digital channel (Channel *46). *See Sixth Report and Order*, 12 FCC Rcd at 14783; 47 C.F.R. § 73.622 (2003).

⁴⁶ As noted above, one application has been accepted for filing for the reserved allotment in Page, Arizona. Whether the application remains viable, however, is unclear. In 1997, the Chief of the Media Bureau sent a letter to the applicant requiring that its board membership be modified to comply with Commission rules and policies. *See* Letter from Clay C. Pendarvis, Mass Media Bureau, Federal Communications Commission, to Lake Powell Television Association, at 1 (Nov. 12, 1997). The letter gave the applicant twenty days to provide additional information, specifying that failure to do so would result in the dismissal of the application. *Id.* at 2. Although CDBS does not reflect that the application has been dismissed, the Commission's files on the application contain no further documents beyond the November 12 letter.

⁴⁷ Including all of Mohave, Coconino, Yavapai, and Navajo Counties, the southern half of Apache County, and one-quarter of Gila County. For square mileage calculations, *see* About Counties - Find a County, Nat'l Assoc. of Counties Website, http://www.naco.org/Template.cfm?Section=Find_a_County&Template=/cfml/countries/statemap.cfm&state=AZ (last visited on Nov. 30, 2004).

⁴⁸ *See* Almanacs, Infoplease Website, <http://www.infoplease.com/ipa/A0108209.html> (last visited on Nov. 30, 2004).

there are only six operating commercial stations and *no* operating noncommercial stations.⁴⁹ By filling this very large geographic void of noncommercial service, grant of the Proposal will better serve the Commission’s statutory mandate of ensuring a fair and equitable distribution of television outlets by bringing an operational noncommercial station to this underserved region.

D. The Phoenix DMA Is Well-Served By Noncommercial Stations, Whereas The Hispanic Population Of Phoenix Needs And Deserves A Competitive Spanish-Language Full-Power Station

The NPRM seeks comments on whether the Phoenix community no longer “needs” two noncommercial educational stations. This query is based upon an unproved and unwarranted assumption that Phoenix ever “needed” two *reserved* noncommercial allotments as there is no apparent “need” for such allotments in many other large U.S. cities. Further, the Channel *39 allotment lay fallow for 30 years before applications were filed in 1996, literally at the last minute before the allotment would have been deleted. And no allotment petitions have been filed in the last 34 years seeking to add a new reserved channel to Phoenix or, for that matter, any community within the Phoenix DMA.⁵⁰ Even if the channel exchange is approved, the city of Phoenix will still be served by at least two noncommercial stations: Station KAET (Channel *8) and Station KPAZ-TV, which operates noncommercially on Channel 21. Further, if the Proposal is implemented as planned, the city of Phoenix will be served by an additional

⁴⁹ In contrast, the vast majority of DMAs ranked in the top 16 have their reserved channels distributed among a number of communities within the DMA.

⁵⁰ The most recent allotment petition for a reserved channel in the Phoenix DMA was granted in 1971. *See Amendment of Section 73.606(b) of the Commission’s Rules, Table of Assignments, Television Broadcast Stations (Coolidge, Ariz., Chico, Calif., Portland, Maine and Rochester, N.Y.)*, 30 F.C.C.2d 296 (1971). The Coolidge allotment currently does not support an operational station. *See supra*.

noncommercial Class A station because NBC Telemundo will assign Station KDRX-CA to CTE, and CTE will operate the station noncommercially.

The NPRM also asks whether the need for a ninth commercial allotment in Phoenix outweighs the need for a second noncommercial station. First, there is no demonstrated “need” for a second noncommercial allotment and a third noncommercial educational station licensed to the city of Phoenix. Moreover, even if the Commission concluded that the Phoenix area “needs” at least two reserved allotments, it has an opportunity to fill that need by granting one of the applications for Channel *43 in Coolidge, Arizona, on reconsideration of the dismissal of the remaining application. Second, as the Commission noted in 1997 when it confirmed its proposal to eliminate all vacant reserved analog allotments, it will be possible to allot new reserved channels after the digital transition is complete.⁵¹ Accordingly, if there is a demonstrated need in the future for additional reserved channels in Phoenix, the Commission has already stated its willingness to accommodate this need.

Most importantly, it is apparent that Phoenix in fact has too *few* commercial allotments to result in more than one of the city’s full-power stations being dedicated to Phoenix’s large and growing Hispanic population. The complete lack of choice among full-power providers of Spanish-language programming alone demonstrates that there are not enough commercial allotments in Phoenix to satisfy the need for competition and programming diversity in this market. And the number of low-power stations in Phoenix attempting to meet this need demonstrates that the demand for competition and diversity

⁵¹ *Sixth Report and Order*, 12 FCC Rcd at 14639 (“After the transition, we also will consider establishing additional noncommercial reserved allotments on recovered spectrum for those existing vacant noncommercial allotments that cannot be replaced at this time”).

in Spanish-language programming is real. Therefore, it is inappropriate to characterize the Proposal as merely bringing a ninth commercial channel to the city of Phoenix when the unique public benefits of the Proposal center on delivering a first competitive full-power Spanish-language television service to an underserved audience – Hispanics living in Phoenix and the surrounding area.

E. Contrary To The Implication Of The NPRM, Nearly Three Hundred U.S. Communities Have A Reserved Noncommercial Channel As Their Sole Allotment

The Commission seeks comment on whether the reservation of Holbrook's only commercial channel is consistent with the asserted concept of commercial primacy (i.e., first allotting a commercial channel to a community before a reserved channel is allotted). The Commission's focus on this claimed allotment consideration disregards the reality that nearly three hundred communities across the U.S. have a reserved channel as their sole allotment. Eight of these communities are (or were) in Arizona, including communities such as Page and Parker, which are located in very rural and isolated parts of the state. Yet the Commission found that a reserved allotment as the sole television transmission service in each of these communities is entirely consistent with the public interest.

This pattern is not confined to small communities in large western states with expansive rural areas. The capital cities of two eastern seaboard states – Dover, Delaware, and Annapolis, Maryland – each were assigned a reserved channel as their sole television allotments. Four major cities in New Jersey (Camden, Trenton, Montclair, and New Brunswick) also were assigned a reserved channel as their sole television allotment. In fact, 58 U.S. cities with populations greater than 20,000 have only a reserved channel allotted to them. All of these facts demonstrate that the allotment consideration asserted

by the NPRM either has been ignored or disregarded in practice many times.

Further, even if this policy were in fact applied consistently in deciding between two abstract and competing allotment proposals – one for a commercial station and one for a noncommercial station, blind adherence to that policy in this case ignores the reality that the Holbrook station already exists and is failing as a commercial outlet. Therefore, the choice is not between two theoretical channels – one reserved and one non-reserved – but rather between the existence of a full-power station licensed to this community of 4,917 residents or the likely creation of a full-power white area.⁵² Therefore, the theoretical allotment consideration cited in the NPRM should not be invoked to deny a proposal that offers the best – perhaps the only – opportunity to preserve Holbrook’s only operational television station and avoid the creation of a white area.

F. The NPRM’s Focus On Theoretical Allotment Priorities That Are Frequently Disregarded In Practice Obscures The Reality That KPHZ Is Not Viable As A Commercial Station

Under the circumstances described above, the corollary question posed by the NPRM – whether there is a greater need at Holbrook for a noncommercial educational channel than for the presently allotted commercial channel – again elevates theory over reality. The question assumes there is a viable choice between a commercial and a noncommercial channel in Holbrook, whereas the reality demonstrates that KPHZ cannot survive as a commercial outlet. The station qualifies as a failing station by all measures applied by the Commission. NBC Telemundo understands that from the time the station signed on in 2001 until NBC Telemundo acquired it in 2002, the station generated no

⁵² The Commission recently accepted for filing a non-exclusive application for a new low power television station to be licensed to Holbrook. *See* FCC File No. BNPTVL-20000831CAF.

revenues, a pattern that has continued since the acquisition. Not surprisingly, the station has zero audience share and ratings. The inescapable conclusion is that Channel 11 in Holbrook is not viable as a commercial outlet and will go dark, thereby ending Holbrook's only television station and creating a white area.

The best remaining hope for preserving the channel in Holbrook and avoiding the creation of a white area is for the Commission to approve the Proposal and allow CTE to operate the station as a noncommercial outlet. The reservation of Channel 11 in Holbrook also would further the Communications Act's objective of a more equitable distribution of noncommercial stations in the state of Arizona, where not a single noncommercial station currently operates outside of Phoenix and Tucson.

Far more relevant to today's public interest than an obscure ratio of commercial to noncommercial allotments is that the impending loss of the Holbrook station will create a white area encompassing thousands of television households. Dozens of Commission precedents agree that bringing a first reception service to those areas without any over-the-air full-power television service is the Commission's highest allotment priority.⁵³ Accordingly, in this unusual case, the Commission's statutory mandate to ensure a "fair, efficient and equitable distribution of radio service" clearly favors adoption of the proposed exchange. Accordingly, if the Commission truly wants to foster its traditional allotment policies, its first priority should be avoiding the creation of a white area by

⁵³ As set forth in the 1952 Report and Order, the first television allotment priority is to provide at least one television service to all parts of the United States. *Sixth Report & Order on TV Allocations*, 41 F.C.C. 148. The Commission has followed this precedent through the years. See, e.g., *North Carolina*, 19 FCC Rcd 14618; *Amendment of Section 73.606(b), TV Table of Allotments, Television Broadcast Stations. (Vernal and Santaquin, Utah, Ely and Caliente, Nevada)*, Notice of Proposed Rulemaking, 16 FCC Rcd 20523 (MMB 2001); *Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (International Falls and Chisholm, Minnesota)*, Report and Order, 16 FCC Rcd 17864 (MMB 2001).

granting the Proposal.

G. CTE Is Ready, Willing, And Qualified To Preserve Holbrook's Only Local Full-Power Television Outlet

Against this background of facts, the Commission again poses a largely theoretical concern – whether Holbrook is capable of sustaining a noncommercial educational station. The answer is simple – CTE should be given an opportunity to try to save free, over-the-air, full power television service in Holbrook. Indeed, CTE, with its existing base of committed supporters who have demonstrated their willingness to contribute financially, clearly is better suited than other groups to sustain the station. In addition, the consideration to be paid to CTE by NBC Telemundo will provide further support, which will assist CTE in making the transition to full digital broadcasting. Moreover, CTE has the support of nearly 30 religious and/or noncommercial broadcasters who are filing comments in this proceeding urging the Commission to grant the Proposal.

The Commission also questions whether CTE is prepared to take the steps necessary to qualify the organization to serve as the licensee of a Holbrook television station. The answer is unequivocally yes. CTE is committed to expanding its board of directors to include representatives of the Holbrook community and looks forward to becoming integrated into this community of nearly 5,000 people. CTE expanded its board of directors in this manner to ensure that the board was broadly representative of the Phoenix area in connection with the processing and grant of its construction permit application for Channel *39 in 2000. In that proceeding, the Commission specifically found that CTE qualified in all respects to be the licensee of a reserved channel, approved a global settlement among a number of competing applicants, and granted the

construction permit for the new station to CTE.⁵⁴ Following the agency's action, CTE constructed the new station and put it on the air and has since operated the station in the public interest. Upon grant of the license modifications sought through the Proposal, CTE will be equally qualified to serve as the licensee of a reserved channel in Holbrook, and its operation of the Holbrook station will serve the public interest.

H. The Presence Of The Vacant Noncommercial Allotment At Holbrook Underscores One Of The Central Tenets Of The Proposal – That Holbrook Presents Exceptionally Difficult Challenges To Broadcasters

The NPRM notes that Holbrook has had a vacant reserved allotment for many years, which will be deleted pursuant to the *Sixth Report and Order* and implies that this vacancy weighs against the Proposal. To the contrary, the vacant reserved allotment in Holbrook underscores one of the central tenets of the Proposal – that Holbrook is a very challenging broadcast market for noncommercial and commercial broadcasters alike. When faced with the choice between creation of a white area and the preservation of Holbrook's only operational television station by a ready, willing, and qualified noncommercial operator, however, the Commission's allotment priorities would seem to be served best by supporting the Proposal.

IV. ENSURING ACCESS TO FREE, OVER-THE-AIR TELEVISION IS A FUNDAMENTAL ELEMENT OF THE COMMISSION'S OBLIGATION TO ACT IN THE PUBLIC INTEREST

The NPRM asks if the needs of Phoenix's Spanish-speaking population are currently being met, whether by other commercial or noncommercial stations already serving the community or by cable or DBS. The answer is simple and straightforward –

⁵⁴ See FCC File No. BPET-19960923KI (Legal Action Information).

the needs of Spanish-speaking viewers for a free and competitive over-the-air television service are not being met by *any* measure *ever* used by the FCC to determine the adequacy of service to the public.

A. Diverse And Extensive FCC Precedent Recognizes The Unique Importance Of Spanish-Language Broadcasting And Supports Efforts To Improve The Quantity, Quality, And Competitiveness Of Such Programming

Improving the quantity, quality and competitiveness of television service delivered to Spanish-speaking viewers is, independently, an important public interest objective that finds ample support in the FCC's allotment and other precedents. In an allotment proceeding very similar to this Proposal, which preceded the adoption of the *Channel Exchange Order*, the FCC approved a proposal in which commercial Channel 60 was reserved and moved to San Mateo, California, and NCE Channel 14 was dereserved and moved to San Francisco.⁵⁵ The Commission's approval was based in part on the fact that the commercial station operating on the newly dereserved Channel 14 would be "able to provide improved coverage to an important part of the total Spanish language population in a 10-county area by virtue of the new equipment it can use on Channel 14."⁵⁶ Nowhere is real Spanish-language competition needed more than in Phoenix.

The Commission in the *San Francisco/San Mateo* case also pointed to the importance of the financial assistance being provided by the commercial operator to the NCE operator, which would enable the NCE station to improve its equipment and

⁵⁵ See Amendment of Section 73.606(b), *Table of Assignments, Television Broadcast Stations (San Francisco and San Mateo, California)*, 68 F.C.C.2d 860 (1978).

⁵⁶ *Id.* at 862.

facilities.⁵⁷ With the ongoing digital transition placing a particularly heavy burden on noncommercial operators, such financial assistance is more important than ever before. Grant of the Proposal will result in the payment of consideration to CTE that will in turn facilitate the transition of CTE's station to digital transmission.

The Commission has recognized the importance of bringing programming to diverse ethnic groups and those speaking languages other than English in numerous other contexts as well. For example, in 1980, when the FCC re-examined its policy on time brokerage agreements, it based its decision to encourage time brokerage – which represented a departure from the FCC's earlier-expressed concerns about improper delegations of control – on the assumption that time brokerage could foster healthy program competition and enhance diversity of programming.⁵⁸ The Commission found in that proceeding that a change in policy was warranted in part because the programming needs of certain audiences continued to go unmet. The Commission noted that this was particularly the case for foreign language audiences⁵⁹ and therefore concluded that greater flexibility in time brokerage and time sharing arrangements could encourage more programming responsive to the needs of those specialized audiences. Notably, the Commission made these statements without reference to any specific market; certainly, the Commission's reasoning applies even more powerfully to the nation's ninth-largest Hispanic television market, where nearly one million Hispanics have free, over-the-air access to only a single full-power Spanish-language television station.

⁵⁷ *Id.* at 861 n.2.

⁵⁸ See *Petition for Issuance of Policy Statement or Notice of Inquiry on Part-Time Programming*, 82 F.C.C.2d 107, 108 (1980).

⁵⁹ *Id.* at 120.

The major urban center of every top-ten Hispanic DMA other than Phoenix has at least two full-power Spanish-language television stations competing for viewers. Telemundo and Univision are primary competitors in all of those markets. In Los Angeles, the top Hispanic DMA, six full-power stations offer genuine competition in Spanish-language television broadcasting. The Houston DMA has five full-power Spanish-language broadcasters (Telemundo, Univision, Telefutura (a Univision subsidiary), Azteca America and Liberman Broadcasting), while the New York, Miami, and Dallas-Ft. Worth DMAs each have four competitors in their major urban cores, and Chicago and San Francisco each have three. Of the top ten markets, only Phoenix fails to provide the Hispanic population within its central metropolitan area with a diversity of Spanish-language information sources over the public airwaves.

The Commission has justified waivers of specific FCC rules largely or solely on the basis that such waivers would result in greater consumer access to foreign-language programming and, more specifically, Spanish-language programming. For example, in 1978, when the FCC commenced a proceeding to explore possible changes in the network representation rule, the Commission granted a temporary waiver of the rule to Univision to allow the network to represent its non-owned affiliates in the spot advertising market.⁶⁰ The Commission subsequently granted temporary waivers to Telemundo and to Latin International Network Corporation. In 1988, when the FCC adopted a Further Notice of Proposed Rulemaking in that proceeding, it observed:

Early indications are that the presence of a second
Hispanic television network has expanded the

⁶⁰ *Network Representation of TV Stations in National Spot Sales*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, BC Docket No. 78-309, 43 Fed. Reg. 45895, 45898 (Oct. 4, 1978).

overall advertising market. . . . Hispanic television advertising revenues more than doubled between 1982 and 1986 (to \$184 million) and the expectation of industry participants is that the presence of Telemundo will expand the overall advertising market even further. It seems that granting the waiver to Telemundo has encouraged new entry into “networking” and has enhanced rather than discouraged competition in the delivery of television service to the public.⁶¹

When the Commission made each of those waivers permanent in 1990, it again emphasized the important role the waivers had played in encouraging the development of foreign-language networks:

Univision has grown from a few affiliates . . . to over a dozen UHF full-power television stations, and many low power and translator television stations. . . . Telemundo, first launched in 1987, is already an aggressive competitor in the delivery of Spanish-language programming. Both Univision and Telemundo attest to the fact that the waiver has enabled them and their affiliates to grow as providers of foreign-language television programming to the public. Based on over a decade of experience in observing the consequences of our initial waiver to Univision and the overall record herein, it appears clear to us that had we not waived the network representation rule in 1978, the development of the above-referenced new foreign-language programming services would have been hampered, if not stifled completely, an outcome clearly inconsistent with the public interest. ***Moreover, the record evidence in this proceeding shows that the waivers of the network representation rule granted to both Univision and Telemundo continue to provide additional benefits in that they further several of the Commission’s longstanding goals: encouraging the growth and development of new networks; fostering foreign-language programming; increasing programming diversity; strengthening competition among stations; and fostering a competitive***

⁶¹ See Amendment of § 73.658(i) of the Commission’s Rules, Concerning Network Representation of TV Stations in National Spot Sales, Further Notice of Proposed Rule Making, 3 FCC Rcd 2746, 2750 (1988) (citations omitted).

*UHF service.*⁶²

For all of the reasons it gave when it granted the original waivers, the FCC has recently granted a similar waiver to Azteca America, which underscores that the Commission's long-stated goal of fostering access to foreign language programming remains as – or even more – compelling today.⁶³

The Commission also has granted waivers of the spacing requirements for television stations based in part on the fact that the short-spaced proposals would improve service to Spanish-language viewers.⁶⁴ Even though the proponents of the short-spacing waivers in *KCRA* were unable to make the threshold showing that their existing transmitter sites were no longer suitable and that there were no other fully-spaced or less short-spaced transmitter sites from which they could operate, the Commission found that these deficiencies were not dispositive because of “the unusual combination of the public interest factors presented here.”⁶⁵ Further, the Commission ruled that the issue of coverage gains and losses – usually of primary importance – likewise was not dispositive: “The weighing process in which we engage to determine whether a projected loss of service will be outweighed by other factors involves more than a mere comparison of numbers. In this case, we find that the loss of service is of marginal significance because the loss area is well served by numerous other television stations and . . . there are

⁶² See *Amendment of §73.658(i) of the Commission's Rules, Concerning Network Representation of TV Stations in National Spot Sales*, Report and Order, 5 FCC Rcd 7280, 7281-82 (1990) (emphasis added) (citations omitted).

⁶³ See *Azteca International Corporation (Azteca America)*, 18 FCC Rcd 10662 (MB 2003).

⁶⁴ See *KRCA License Corp.*, 15 FCC Rcd 1794 (1999).

⁶⁵ *Id.* at 1800.

substantial public interest benefits including substantial service gains to Spanish- and Asian-language viewers.”⁶⁶

The Commission has recognized the critical importance of serving the Spanish-speaking community in a number of its other rules as well. For example, the FCC’s closed captioning rules recognize the unique status of the Spanish language in America. In 1997, the FCC adopted rules implementing Section 713 of the Communications Act of 1934, which was added to the Act by Section 305 of the Telecommunications Act of 1996. Section 713 generally requires that video programming be closed captioned. The Report and Order adopting the original rules granted an exemption from the closed captioning requirement for *all* non-English language programming.⁶⁷ On reconsideration, however, the Commission was persuaded that Spanish was unique (given the size and rapid rate of growth of the Spanish-speaking population) and therefore concluded that Spanish-language programming also should be closed-captioned, albeit on a somewhat more lenient phased-in schedule.⁶⁸

The Commission reached a similar conclusion with respect to the availability of telecommunications relay services for the hearing-impaired. In the Report and Order adopted in 2000 in CC Docket No. 98-67, the Commission encouraged the provision of non-English language relay services by finding such services eligible for reimbursement out of the interstate relay funds. However, in the same order, the Commission singled out

⁶⁶ *Id.* at 1802.

⁶⁷ *Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd 3272 (1997).

⁶⁸ *Closed Captioning and Video Description of Video Programming*, Order on Recon., 13 FCC Rcd 19973 (1998).

Spanish-language relay services for special treatment and *mandated* that interstate common carriers provide interstate Spanish relay service by March 1, 2001. As with the provision of closed-captioning in Spanish, the FCC found that Spanish was distinct from all other foreign languages because it is spoken by more residents of the U.S. than any other foreign language and because the number of Spanish-speaking persons is significantly larger than any other non-English speaking population and is growing rapidly.⁶⁹

As the foregoing summary of FCC precedents demonstrates, the Commission unquestionably views speakers of Spanish as a distinct segment of the population that requires special FCC protections with regard to their access to multiple and diverse television programming choices. Of particular relevance to the Proposal, the precedents demonstrate that providing new and expanded over-the-air television service to Spanish-speaking viewers has been a longstanding goal of the FCC. Indeed, the Commission has found repeatedly that the substantial public interest in achieving this goal justifies waiving certain of its rules and modifying long-standing policies. That goal has become even more important as Univision solidifies its dominant position in Spanish-language broadcasting and as Spanish-language television evolves from a niche to a news and information lifeline for millions of Americans. There is much evidence that the Spanish-language television market should be viewed as a distinct market for Commission purposes. That the only parties – other than Telemundo – who have been willing to enter

⁶⁹ See *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 5140, 5154-55 (2000); see also 47 C.F.R. § 64.603 (2002); *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Second Report and Order, Order on Reconsideration, 18 FCC Rcd 12379, 12434-36 (2003) (noting that Hispanics are the fastest growing minority in the deaf school-age population in the United States).

this fast-growing market in any substantial way are Mexico's top two television services itself is an indication as to the uniqueness of (and entry barriers to) this market.

B. The Needs Of Phoenix's Hispanic Residents Are Not Being Met By Existing Media

As the foregoing discussion demonstrates, the need to provide access to competitive over-the-air, full-power Spanish-language television services has sufficed under the Commission's precedents for multiple waivers of the Commission's Rules and modifications of its policies. The Hispanic residents of Phoenix need and deserve that access. In the face of this compelling need, the NPRM asks whether existing low power television stations and pay services can adequately serve the Spanish-speaking population of Phoenix. The answer – supported by both overwhelming factual evidence and legal precedent – is a resounding no.

The recent Survey of Hispanic viewers in Phoenix commissioned by NBC Telemundo establishes that (i) 41 percent of Spanish-dominant respondents rely on indoor antennas to receive television programming; (ii) 55 percent of respondents who rely on over-the-air reception do not watch Telemundo's Class A station in Phoenix because the signal is too weak; and (iii) 76 percent of these respondents would watch the station more often if the signal were better.⁷⁰ The inadequacy of the station's signal and coverage is bolstered by dozens of advertisers who have submitted statements to NBC Telemundo explaining that they do not buy advertising time on the Class A station because of the station's reduced signal strength and limited reach in the DMA and the lack of guaranteed carriage on the basic tier of the cable systems serving the DMA. In addition to these real-world, practical limitations of low power stations and the reality

⁷⁰ See Survey.

that Spanish-dominant viewers are more likely to rely on an over-the-air signal, the Commission's own precedents establish conclusively that, as a matter of law, low power stations and pay video services have never been considered adequate substitutes for free, over-the-air, full power stations.

1. A Recent Professional Telephone Survey Of Hispanic Residents Of Phoenix Confirms That A Full-Power Station Is Needed To Adequately Serve This Population

The conclusion that a full-power station is needed to adequately serve Phoenix's Hispanic residents is substantiated by the Survey, which was commissioned by NBC Telemundo and conducted in October and November 2004 by WestGroup Research, based in Phoenix. The Survey of 500 Phoenix-area adults was based on a sample of randomly chosen respondents with Phoenix area telephone numbers who were further screened to interview only those of Hispanic/Latino descent whose households speak Spanish at least half the time.⁷¹ The Survey was conducted by bilingual interviewers, and the margin of error for the study is +/- 4.4% at a 95% confidence level. Forty-six percent of the sample reported watching between 11 and 30 hours of television weekly and 14 percent reported watching more than 30 hours per week. Seventy-seven percent of the respondents reported that their television viewing was comprised of between 50 percent and 100 percent Spanish-language programming, with fully forty percent of these respondents watching Spanish-language programming exclusively. Forty-six percent of those surveyed report that they receive their local television programming via over-the-air broadcasts, while the remainder report receiving their television programming via

⁷¹ Fifty-three percent of the sample reported speaking Spanish at home all of the time; 20 percent reported speaking mostly Spanish at home; and 27% reported that their households were bilingual.

cable, satellite or some other delivery method. However, Spanish-dominant households are much more likely to receive local programming by free over-the-air signals, compared to bilingual households – only thirty percent of the Spanish-dominant respondents reported receiving their television programming via cable, whereas 52 percent of Spanish-dominant respondents reported relying on over-the-air signals. Moreover, the Survey demonstrated that 41 percent of the Spanish-dominant households receive their television programming through an indoor antenna, compared to just 15 percent for bilingual households.

Among respondents who rely on over-the-air signals and who reported watching Univision’s full-power Channel 33 more often than Telemundo’s low-power Channel 48, *nearly half* – 42 percent – cited Channel 48’s weak signal and reception problems as reasons they did not watch the Telemundo station more often. Among these respondents who rely on indoor antennas, *70 percent* reported that they received better reception of Univision’s Channel 33. The percentage was not much better for those using outdoor antennas – 62 percent of these respondents reported that Channel 33 had a stronger signal than Channel 48. *Similarly, 55 percent of antenna users reported that they do not watch Channel 48 because its signal is too weak, and 76 percent of these respondents stated that they would watch Telemundo more often if the signal were better.*

The Survey also demonstrated that the lack of choice in Spanish-language programming in Phoenix is not merely a theoretical concern. To the contrary, the absence of diversity and competition has a real impact on Hispanic viewers, especially Spanish-dominant viewers who cannot turn to English-language channels for news, information, and entertainment. Nearly 90 percent of the respondents reported that local

television stations were their dominant source of local news and information. As discussed above, many of Phoenix's Spanish-dominant residents are very recent immigrants to the United States. Access to news and information about their new homeland presented in their native language is critical to helping them integrate into the economic and social life of their community. Not surprisingly, more than 97 percent of the respondents stated that having local Spanish-language television was important to them, and more than 94 percent of respondents agreed that it is important to have more than one local Spanish-language channel available to increase diversity and options for Spanish-language viewers.

The Survey results thus demonstrate that even if Commission precedent treated pay video services as the equivalent of free, over-the-air signals (which it clearly does not), a majority of Spanish-dominant households in Phoenix are currently being deprived of a meaningful choice in Spanish-language programming. Because these households rely on free, local, over-the-air broadcasts as their most important source of local news and information, the need for choice and diversity in local programming cannot be overstated. This need is not being met, however. With the exception of Telemundo's Channel 48, none of the low power Spanish-language channels serving Phoenix offers local news programs. And although Telemundo offers some local news, its signal is not strong enough to compete with Univision's full-power station.

2. Advertisers Are Unwilling To Buy Time On Low Power Stations, Which Deprives These Stations Of The Revenues Needed To Produce Local News And Other Local Programming

To survive, commercial stations need advertisers as well as viewers. Without higher viewership, advertisers are unwilling to buy time on low power stations,

particularly those competing head-to-head with full power stations. The unwillingness on the part of advertisers to buy time on low power stations has its greatest impact on the production of local news, because without advertiser support, low power stations cannot afford to develop and produce high-quality local programming.

Telemundo has extensive first-hand experience with the refusal of advertisers to buy time on its Class A station in Phoenix. As the attached declarations from 34 potential advertisers targeting Hispanic viewers in the Phoenix market demonstrate,⁷² the reluctance to place ads on low power stations, including specifically KDRX, results directly from the coverage problems associated with the station's reduced operating power. These advertisers emphasize that their decision to avoid Station KDRX is not related to the station's programming or rates for advertising, but results solely from the inability of the station to serve the entire DMA with a strong signal and to guarantee carriage of the station on basic-tier cable.

If the Commission grants the Proposal, however, Telemundo is confident that these advertisers will support its full-power station in Phoenix. Accordingly, to demonstrate its commitment to the Hispanic audience in Phoenix, NBC Telemundo has pledged to broadcast a minimum of one hour of locally produced news each day Monday through Friday promptly upon commencing commercial operations on Channel 39 in Phoenix.

3. Low Power Stations Are Not An Adequate Substitute For Full-Power Stations Under Any Commission Precedent

The NPRM observes that four Spanish-language broadcasters (Univision, Telemundo, Telefutura and Azteca) all provide a primary television service to Phoenix,

⁷² See Declarations of Phoenix DMA Advertisers, attached hereto as Exhibit 3.

“either via a full service or Class A television station” and asks whether Phoenix’s Spanish-speaking population is adequately served by these stations.⁷³ The NPRM fails to note, however, that of these four Spanish-language television broadcasters, only *one* – Univision – serves the city of Phoenix with a full-power station. The remaining three broadcasters all operate Class A stations in Phoenix.

Although low power and Class A stations unquestionably play a meaningful role in a competitive media marketplace, *no* Commission precedent recognizes these stations as substitutes for full-power stations. Thus, the Commission’s media ownership rules do not permit low power stations to be counted as independent media voices in a market to assess compliance with the local and cross-ownership limits.⁷⁴ Nor are these facilities considered in determining, pursuant to the “transmission test,” whether an area is unserved or underserved in ruling on requests for satellite status by full-power television stations.⁷⁵ If the FCC truly believed these stations were adequate substitutes for full-

⁷³ NPRM, 19 FCC Rcd at 14933-34.

⁷⁴ The local television ownership rule allows an entity to own two television stations in the same DMA, provided, among other things, that “at least eight independently owned and operating *full-power* commercial or non-commercial TV stations” would remain in the DMA after the proposed combination. 47 C.F.R. § 73.3555(b)(2)(ii) (2002) (emphasis added). The radio-television cross ownership rule limits the number of commercial radio and television stations an entity may own in a local market, depending on the number of independently owned media voices that would remain after the proposed merger. Media voices, for purposes of the rule, include “independently owned and operating *full-power* broadcast TV stations within the DMA of the television station’s community of license” that have overlapping Grade B contours, but not low-power stations. 47 C.F.R. § 73.3555(c)(3)(i). In the 2002 Biennial Review, the Commission specified that “[f]or purposes of counting the television broadcast stations in the market, we will include only full power authorizations. Thus, contrary to the suggestions of some commenters, we will not include Class A TV, LPTV stations or TV translators.” *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13691 n.397 (2003).

⁷⁵ An applicant for TV satellite status must demonstrate, among other things, that the proposed satellite station would provide service to an underserved area. One element of that showing is the “transmission test,” whereby a proposed satellite’s community of license is considered underserved if there are two or fewer full-service stations already licensed to it. For purposes of the “transmission test,” stations considered licensed to a community include all educational, regular TV and TV satellite stations, but

Footnote continued on the next page.

power stations, they would be counted in measuring the competitive profile of a market. Attributable interests in low power stations are not counted against an owner of broadcast stations in assessing compliance with the ownership rules⁷⁶ – yet another indication that these stations are not considered fungible with full-power stations. Similarly, the Commission does not consider the presence of low power stations when identifying white and gray areas in allotment and facility modification proceedings,⁷⁷ again underscoring the lack of substitutability. Because of their secondary status, these stations are accorded far fewer rights in the digital transition.⁷⁸ Finally, these stations are not accorded must-carry rights except in very limited and exceptional circumstances.⁷⁹

In Phoenix, this distinction as to must-carry rights has a real and obvious adverse

exclude low power television and translator stations. *Television Satellite Stations Review of Policy and Rules*, Report and Order, 6 FCC Rcd 4212, 4215 (1991).

⁷⁶ See 47 C.F.R. § 74.780 (2003).

⁷⁷ See, e.g., *Application of Elba Development Corp. (KQTV-TV), St. Joseph, Missouri*, 96 F.C.C.2d 376, 384 (1984); *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Farmington and Gallup, New Mexico)*, 11 FCC Rcd 2357, 2359 (1996).

⁷⁸ To transition full-service TV stations to digital service while permitting viewers to continue using their existing TV sets to receive analog programming, the Commission awarded full-service stations a second channel for digital operations during a multi-year transition period. *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, MB Docket No. 03-185, FCC 04-220, ¶ 15 (Sept. 30, 2004). The Commission, however, did not award second channels to TV translator, low power television or Class A stations to facilitate their digital transition. *Id.* Instead, the Commission intends to grant digital companion channels to *most* low power stations after spectrum is returned at the end of the full-service DTV transition. *Id.* ¶ 17. The rules governing digital low power, translator and Class A stations will preserve their role as secondary and complementary services to full-power stations. *Id.* ¶ 20.

⁷⁹ Low power and Class A stations are not eligible for mandatory carriage under 47 U.S.C. Section 534. Cable operators are required to carry the signals of “local commercial television stations,” which are defined as “full-power television broadcast station[s]... within the same television market as the cable system. 47 U.S.C. § 534(a) and (h)(1)(A). The Commission has concluded that Class A stations do not have the same must-carry rights as full-service television broadcast stations, but rather have the same limited must-carry rights as low power television stations. *Establishment of a Class A Television Service*, 16 FCC Rcd 8244, 8259-60 (2001).

effect on competition. While Univision's station is carried on the basic tier, Telemundo's programming (as well as that of the Azteca and Telefutura Class A stations) is carried pursuant to retransmission consent on an expanded basic tier. To consumers, the difference is dramatic: to subscribe to the basic tier costs a consumer \$15.95 per month; for the expanded basic tier, however, the consumer must pay \$37.95 per month. In other words, to obtain access to the Class A Spanish-language stations, cable subscribers must pay a premium of \$22.00 on top of the basic cable rate of \$15.95. Thus, the total price to obtain the expanded basic tier is more than *double* the rate for basic cable service.

The foregoing precedent demonstrates that there is no context in which the FCC treats low power and Class A stations as the equivalent of full power stations. Therefore, for the Commission to deny the Proposal based on the presence of service by low power and Class A stations would fly in the face of every precedent and rule. If, despite this clear precedent, the Commission truly believes that Class A and low power stations are the functional equivalent of full power stations for delivering "primary television service" to Spanish-language viewers, then the Commission should be equally willing to rely on these stations for delivering a noncommercial service to the residents of Phoenix, as CTE has promised to do with KDRX. If these facilities are indeed sufficient for noncommercial services, no harm can result from granting the Proposal because it includes as one of its principal elements the substitution of a noncommercial service on KDRX-CA for the same noncommercial service presently airing on KDTP. On the other hand, if the Commission does not believe that KDRX is an adequate substitute for purposes of delivering noncommercial programming, but that the station *is* adequate for purposes of delivering Spanish-language programming to Phoenix's underserved

Hispanic audience, this disparity in treatment diminishes the importance of this large and growing segment of the population.

4. Pay Services Are Not An Adequate Substitute For Free, Over-The-Air Television Services Under Any Commission Precedent

Similarly, service from cable or DBS has never before been considered an adequate substitute for free, over-the-air television service.⁸⁰ Thus, the Commission has never accepted an argument in an allotment or facilities modification proceeding, for example, that the availability of cable or DBS services nullifies a white or gray area.⁸¹ As a matter of public policy, this is clearly the right result – pay services have never been considered the equivalent of free over-the-air television service. This policy is particularly appropriate where, as in the Phoenix Spanish-language market, the target audience subscribes to pay services in below-average percentages. Fewer than one-third of Phoenix’s Spanish-dominant television viewers subscribe to cable, compared with the overall Phoenix average of 60%.⁸² For the Commission to suggest that these Hispanic viewers can gain access to programming diversity by subscribing to pay services (and paying much higher subscriber fees to gain access to the expanded basic tier, as discussed

⁸⁰ See *Carriage of the Transmissions of Digital Television Broadcast Stations*, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15096 (1998) (explaining that Congress adopted the mandatory cable carriage provisions under the Cable Television Consumer Protection and Competition Act, 47 U.S.C. § 521 *et seq.*, to ensure: “(1) the continued availability of free over-the-air television broadcast service and (2) the benefits derived from the local origination of the programming from television stations.”) At a recent hearing, Chairman Powell stated, “I think it’s essential that free over-the-air services remain competitive and viable and continue to provide programming alternatives. What I don’t want is for the competitive environment to drive the migration of quality programming to cable and away from broadcasting.” See Field Hearing, *Broadcast Ownership En Banc*, Richmond, Virginia, Chairman Powell Presiding, 2003 FCC LEXIS 2010, at *12 (Apr. 15, 2003).

⁸¹ See, e.g., *Application of Central Alabama Broadcasters, Inc. (WSLA-TV)*, Selma, Alabama, 88 F.C.C.2d 1501, 1533 (1982); *Application of KTVO, Inc. (KTVO-TV)* Kirksville, Missouri, 96 F.C.C.2d 472, 480 (1983).

⁸² See note 8 *supra*.

above) smacks of a “let them eat cake” attitude that is the antithesis of the FCC’s traditional allotment policies and priorities.⁸³

C. The Disparities In Technical Facilities Justify The Commission’s Policy of Disregarding Low Power Stations For Purposes Of The Media Ownership Rules And Render These Stations Ineffective Competitors To Univision’s Full-Power Phoenix Station

The Commission’s policy of disregarding low power and Class A stations for purposes of the media ownership rules and station allocations and modifications, discussed above, is founded on the inherent technical limitations and secondary status of these facilities. The most obvious of these technical limitations is the authorized power level, which in turn determines virtually every other aspect of service. The Commission observes that the predicted coverage of NBC’s Class A station in Phoenix is nearly identical to the coverage provided by KDTP and seeks comments on whether, in light of this coverage, the allotment of a full-power station is necessary to meet unserved needs. But the Commission’s observation is both incomplete and incorrect.

Within Phoenix, a strong, reliable over-the-air signal is particularly important for reaching Spanish-dominant viewers, because these viewers have much lower cable penetration rates and are much more likely to rely exclusively on indoor antennas to receive television signals. Thus, although the City Grade standard for UHF stations is based on a signal strength of 80 dBu, this is not the most appropriate measure for

⁸³ The Comments filed in this proceeding by CoxCom, Inc., the major cable provider in the Phoenix DMA, describe a variety of Spanish-language programming services offered by the cable system to Phoenix subscribers, including three (soon to be four) full power and low power local television stations. *See* CoxCom, Inc. Comments at 2, MM Docket 04-312 (Oct. 15, 2004). NBC Telemundo applauds Cox’s commitment to serving the Hispanic audience in Phoenix. However, these services do not benefit the majority of Spanish-dominant viewers, who do not subscribe to cable, and, as noted above, for those Hispanic viewers who do subscribe to cable, only one of the four local television stations carried by Cox – Univision’s Channel 33 – is available on the basic tier. *See* <http://www.cox.com/phoenix/digitalcable/lineup.asp> (last visited on Nov. 28, 2004).

determining whether Hispanic viewers in Phoenix are actually able to receive an adequate signal over the air.

When the FCC developed the signal strength values used to determine the grades of service in 1949-1952, it relied on planning factors that assumed the use of a rooftop antenna and reception of signals at a uniform 30 feet above ground.⁸⁴ The City Grade standard for UHF stations is based on a signal strength of 80 dBu, without consideration of building loss.⁸⁵ Viewers in urban areas, however, often use indoor receiving antennas, such as “rabbit ears” for VHF and loops for UHF. Accordingly, the values for antenna gain and line loss must be adjusted and additional factors added to determine the required field strength for passable reception. The required field strength then becomes 92 dBu for reception using a receiver having an integrated loop antenna at 30 feet above ground.⁸⁶ Furthermore, as the NBC Telemundo Survey indicated, the vast majority (77%) of the Spanish-dominant viewers in Phoenix live in single-family homes.⁸⁷ If the indoor receiver of television signals is located at 10 feet above ground (the average for receivers in one and two-story buildings, 5 and 15 feet above ground, respectively), rather than the 30 feet assumed by the FCC’s UHF standard, the field strength needed for acceptable viewing over-the-air becomes 101.5 dBu.⁸⁸ In view of the substantially lower

⁸⁴ UHF Comparability Task Force, FCC, *Comparability for UHF Television*, at 180, 184 (Sept. 1979).

⁸⁵ See Engineering Statement at 2.

⁸⁶ *Id.* at 3.

⁸⁷ See Survey. Moreover, in the western U.S., approximately 47.5% of all housing units are single-story, 38.5% are two-story and only 14% are taller than two stories. Engineering Statement at 3 (citing construction and housing data).

cable penetration rates among Hispanic households than the national average and the substantial reliance on indoor antennas located in single-family homes, it is clear that a strong over-the-air signal is necessary to serve this segment of the population adequately.

When the 101.5 dBu measure for passable indoor antenna reception of the UHF signal is applied, it is clear that the performance of NBC Telemundo's Class A station falls well short of a typical full-service UHF station. As set forth in detail in the Engineering Report, the coverage of KDRX-CA's facilities is 108 percent, 6.2 percent, and 3.9 percent worse (at, respectively, the 101.5 dBu, 90 dBu and 80 dBu levels) than the average coverage of the seven full-service UHF stations in Phoenix.⁸⁹ Accordingly, if Telemundo were able to broadcast using UHF facilities, as requested in the Proposal, its service to Phoenix's Hispanic viewers would improve dramatically, particularly for those viewers relying on indoor antennas.

V. THE PROPOSAL WARRANTS A WAIVER OF THE COMMISSION'S UNCODIFIED POLICY REQUIRING NEW COMMERCIAL ALLOTMENTS TO BE MADE AVAILABLE FOR COMPETING APPLICATIONS

Citing the *Sixth Report and Order* that adopted the Television Table of Allotments, the NPRM asserts that dereservation of Channel *39 at Phoenix would require the Commission to entertain competing applications for the newly dereserved channel.⁹⁰ Nonetheless recognizing that the Commission may refuse to entertain

⁸⁸ *Id.* at 3. This does not account for building penetration loss. *Id.* Building loss may be even higher where there are concentrations of buildings made with stucco walls, as in Phoenix, where the wire mesh used in the construction results in greater signal attenuation.

⁸⁹ *Id.* at 5.

⁹⁰ NPRM, 19 FCC Rcd at 14932-33 (citing *Sixth Report & Order on TV Allocations*, 41 F.C.C. at 212 n.51).

competing applicants if the public interest would be served thereby, the NPRM seeks comment on whether public interest considerations in this case outweigh the benefits of entertaining competing applications should the Commission adopt the Proposal.⁹¹ As discussed in detail below, the Commission's "uncodified rule" does not apply to the instant proposed channel exchange and even if it did, the public interest benefits inherent in the Proposal easily outweigh the need for entertaining competing applications. Only the parties before the Commission can ensure that the benefits of the Proposal will be achieved.

A. The Commission's "Uncodified Rule" Is Not Applicable To The Proposed Exchange

Initially, it is far from clear that the "uncodified rule" requiring that newly dereserved channels be made available for application has any continued validity in the context of a channel exchange. In its 1986 decision establishing a procedure for intra-band channel exchanges between commercial and non-commercial stations,⁹² the Commission acknowledged that application of the "uncodified rule" to channel exchanges had led to a "reluctance by licensees to propose exchanges and to a propensity to withdraw proposals once third party interest is expressed."⁹³ This, found the Commission, frustrated the "clear public benefits" that channel exchanges could produce

⁹¹ *Id.* (citing *Storer Broadcasting v. FCC*, 351 U.S. 192 (1956) and *Malrite of New York, Inc.*, FCC 84-338 (Jul. 31, 1984)). The NPRM appears to suggest that the Commission would be required to entertain competing expressions of interest not only for deserved Channel 39 at Phoenix, but for reserved Channel 11 at Holbrook. *Id.* As expressed in the *Sixth Report and Order*, however, the "uncodified rule" pertains to dereservations of a noncommercial channel. There is no basis for considering competing expressions of interests for a *reserved* Channel 11 at Holbrook.

⁹² *Channel Exchange Order*, 59 RR 2d 1455.

⁹³ *Id.* at 1461.

for the stations involved, and therefore the public.⁹⁴ Additionally, the Commission noted (1) that the withdrawal of proposals upon a third-party expression of interest—an inevitable result of soliciting competing applications—wasted Commission, licensee and public resources; and (2) existing procedures that allowed for competing expressions of interest permitted abuse, “as third parties could express interest in the subject channels primarily for reasons which do not benefit the public, such as to block competition.”⁹⁵ The Commission therefore adopted a procedure to allow commercial/noncommercial channel exchanges without soliciting competing applications for the channels involved, concluding that “licensees will be encouraged to seek improvements by avoiding the costs and risks associated with comparative application proceedings” and that “removing obstacles to channel exchanges offers the possibility of both improved service to the public and more efficient utilization of the spectrum.”⁹⁶ The Commission held that such a procedure did not violate *Ashbacker Radio Corp. v. FCC*.⁹⁷ Noting that *Ashbacker* involved the rights of applicants for an available AM frequency, the Commission observed that:

the channels to be exchanged here between noncommercial educational and commercial television stations are not similarly available, as they are already occupied by the petitioning licensees. Opening such channels to applications by third parties, while theoretically possible, would not be viable, as experience has shown that neither of the potential exchange partners would likely pursue an

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 1462.

⁹⁷ 326 U.S. 327 (1945).

exchange agreement in the face of a comparative hearing.⁹⁸

While the Commission's *Channel Exchange Order* decision adopted Section 1.420(h) of the rules, which by its terms applies to intra-band exchanges between stations that "serve substantially the same market," the decision's various rationales for allowing such exchanges without considering competing expressions of interest are applicable to *all* commercial/noncommercial channel exchanges. The decision's applicability only to intra-band exchanges appears merely to have been a matter of expedience. At the time, the Commission had before it a channel exchange proposal by two UHF licensees in Gary, Indiana, the proponents of which had asked the Commission to bifurcate its consideration of intra-band exchanges on one hand and interband exchanges on the other. The Commission did so, explaining that "[b]ecause of the need for expediting, we are dealing only with intra-band exchanges."⁹⁹

The Commission has never held, however, that its reasons for precluding competing expressions of interest in a channel exchange context apply only to intra-band changes. Indeed, on reconsideration of *Channel Exchange Order*, the Commission refused to so hold. Various parties, recognizing that "the underlying rationales used in the Report and Order may be used to justify interband exchanges," had requested that the 1986 decision be modified or clarified to specifically limit channel exchanges to the intra-band context. The Commission declined the invitation, finding clarification of the

⁹⁸ *Channel Exchange Order*, 59 R.R.2d at 1463.

⁹⁹ *Id.* at 1456 n.1.

1986 decision unnecessary and reconsideration unwarranted.¹⁰⁰

More recently, in its 2002 decision dereserving a noncommercial channel in Pittsburgh,¹⁰¹ the Commission once again suggested that consideration of competing expressions of interest was inappropriate in a channel exchange context. In *Pittsburgh*, the Commission rejected the proponent's argument that the "uncodified rule" had been overturned or abandoned as a general matter.¹⁰² The Commission, however, expressly based its ruling on a distinction between the proposal at issue in *Pittsburgh* – a unilateral dereservation of a noncommercial channel – and channel exchanges:

. . . [I]n each of the instances cited by [the proponent], no educational reservations were eliminated. Rather, the cases cited by [the proponent] involved the exchange of channels or the exchange of a reservation from one channel to another.¹⁰³

In short, the *Channel Exchange Order* decision and subsequent Commission precedent indicate that the "uncodified rule" of the *Sixth Report and Order*, if not wholly abandoned, has not been applied in the context of channel exchanges (whether intra-band or otherwise).¹⁰⁴ Indeed, the same considerations that led the Commission to preclude competing expressions of interest in past channel exchange cases are present here. If competing expressions of interest for the Phoenix and Holbrook channels were accepted

¹⁰⁰ See *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 3 FCC Rcd 2517 (1988).

¹⁰¹ *WQED*, 17 FCC Rcd 14038.

¹⁰² *Id.* at 14055. Ultimately, however, the Commission waived the "uncodified rule" in *Pittsburgh* based on public interest considerations.

¹⁰³ *Id.*

¹⁰⁴ See also *Buffalo*, 14 FCC Rcd at 11858-59 (refusing to apply "uncodified rule" to "swap" of reserved and unreserved Buffalo channels by noncommercial licensee of both stations).

and received, the parties would withdraw their proposal – resulting in wasted Commission and licensee resources and frustrating the public interest benefits of the proposal. Entertaining competing expressions of interest could invite abuse, in the form of expressions made solely to block competition. And as with channel exchanges within the scope of Section 1.420(h), the channels at issue here are occupied and not available. As a legal matter, the same rationales for precluding competing expressions of interest in Section 1.420(h) exchanges apply with equal force to this proposal at issue here.

B. The Unique Public Interest Benefits Of The Proposal Justify A Refusal To Entertain Competing Applications

Even if the Commission were to find that the “uncodified rule” is applicable to this exchange, the unique public interest benefits of the proposal easily justify a decision not to entertain competing expressions of interest. As set forth in the Joint Petition and elsewhere in these Comments, the public interest benefits of the proposed exchange are overwhelming. The proposal offers the best promise of averting the demise of KPHZ and of avoiding the creation of a white area, while providing significant financial assistance to KDTP.¹⁰⁵ It will provide a first competitive full-power Hispanic television service in Phoenix, thus enhancing local service and programming choices to that city’s large and underserved Hispanic population. And it will accomplish these objectives without diminishing either the number of noncommercial television stations or the number of television stations overall in the Phoenix DMA. These public interest benefits far outweigh any need to consider competing applications for the channels involved in the proposal.

¹⁰⁵ In the Notice of Proposal Rule Making leading to the adoption of the channel exchange rule, the Commission specifically noted the benefits of permitting a commercial broadcaster to provide financial assistance to a noncommercial broadcaster in exchange for a superior channel. *See* note 11 *supra*.

Further, these numerous public interest benefits could not be realized *but for* the dereservation of Channel *39 and the reservation of Channel 11 and the modification of the licenses held by the proponents of the exchange. Commission precedent establishes that when the benefits of a proposal could not be obtained *but for* the dereservation, the Commission will waive its uncodified policy requiring new commercial allotments to be opened to competing applications.¹⁰⁶ It is for precisely such reasons that the Commission ruled in the *Channel Exchange Order* that allotments modified pursuant to Section 1.420(h) would not be opened to competing applications. Because only the parties before the Commission can ensure that these benefits will be achieved and because these benefits would not be realized in the absence of the parties' Proposal, the Commission should waive its uncodified policy of requiring newly allotted stations to be made available for competing applications.

VI. CONCLUSION

A full-power Telemundo station in Phoenix will offer, for the first time, genuine competition in free, over-the-air Spanish-language television broadcasting. This competition will directly benefit the exploding Hispanic population in and near Phoenix and the advertisers who seek to reach them. These Phoenix residents and businesses deserve a choice of over-the-air full-power Spanish-language stations – choice for the first time in Spanish-language news programs; choice for the first time in Spanish-language entertainment and children's educational programming; and choice for the first time for advertisers seeking to buy time on full-power Spanish-language television stations in Phoenix.

¹⁰⁶ *WQED*, 17 FCC Rcd 14038; *Buffalo*, 14 FCC Rcd 11856.

Grant of the Proposal will offer immediate, extensive, and ongoing benefits to the public that could not be realized in the absence of the channel exchange. Grant of the Proposal will preserve the current number of over-the-air noncommercial stations in the Phoenix DMA because Holbrook is part of the DMA. It also will preserve the current number of stations operating noncommercially in the city of Phoenix because CTE intends to operate Telemundo's Class A station in Phoenix as a noncommercial station in the same way that Trinity Broadcasting operates Channel 21 noncommercially. Finally, grant of the Proposal will preserve Holbrook's only operating television station, which otherwise appears doomed to fail, thereby creating a white area. All of these factors justify a grant of the Proposal. If the Proposal is granted, the Parties hereby restate their intention to implement it promptly.

Respectfully submitted,

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Dated: November 30, 2004

CERTIFICATE OF SERVICE

I, Theresa L. Rollins, do hereby certify that a copy of the foregoing “Joint Comments of NBC Telemundo License Co. and Community Television Educators, Inc.” was served by electronic mail this 30th day of November, 2004, on the following:

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